COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BARNSTABLE, ss DOCKET NO: SJC-08464

COMMONWEALTH,
Appellee

v.

CHARLES ROBINSON,
Defendant/Appellant

REPLY BRIEF OF DEFENDANT/APPELLANT CHARLES ROBINSON ON APPEAL FROM HIS CONVICTION PURSUANT TO MASS. GEN. L. CH. 278, §33E

JOSEPH F. KROWSKI, ESQUIRE
LAW OFFICE OF JOSEPH F. KROWSKI
30 Cottage Street
Brockton, MA 02301
(508) 587-3701
jfk@krowskilaw.com
BBO: 280540

Dated: March 26, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On August 21, 2000, the Defendant/Appellant, Charles Robinson ("Robinson"), was convicted by a Barnstable County jury of first degree murder for the February 24, 2000, shooting death of Edward Figueroa ("Figueroa"). The verdict rested on the theories of deliberate premeditation and extreme atrocity and cruelty[1]. The jury returned its verdict after two (2) hours and fifteen (15) minutes of deliberation.

Robinson appealed. His direct appeal was stayed for roughly eighteen (18) years to litigate a Motion for New Trial in the Superior Court. On May 23, 2018, the Single Justice vacated the stay.

Robinson submitted his Brief on December 3, 2018. The Commonwealth filed its Brief on March 4, 2019. Pursuant to Mass. R. App. P. 16(c), Robinson serves this Reply[2] in response to the commonwealth's arguments regarding the sufficiency of evidence and a jury issue that presented on the third day of trial.

---

[1] Robison was also convicted of assault and battery by means of a dangerous weapon. That conviction was placed on file.

[2] This Reply Brief is accompanied by a Motion to Extend the Filing Due Date from March 18th to March 25, 2019.

ARGUMENT

I. THE COMMONWEALTH'S EVIDENCE FAILED TO PROVE THE DEFENDANT'S IDENTITY BEYOND A REASONABLE DOUBT

The commonwealth has argued that its case against Robinson "was a strong circumstantial case." (Comm. Br. 34)[3]. It was not. In truth, the commonwealth presented insufficient evidence identifying Robinson beyond a reasonable doubt as the person who committed the crime. See Commonwealth v. Dennis, 442. Mass. 617, 624 (2004)(commonwealth must prove the defendant's identity beyond a reasonable doubt); Commonwealth v. Farley, 443 Mass. 740, 745-46 (2005)(same). The prosecutor utterly failed to prove that Robinson was the person who shot Figueroa.

In its brief, the commonwealth asserts that Robinson's guilt was proven by evidence that "he was the last person seen with the victim, had an argument with him a couple of hours before he was murdered, and the CSLI of his phone was consistent with the time the victim was shot and the location of travel leaving the area that night." (Cm. Br. 37). The commonwealth then suggests Robinson's case compares favorably with the

[3] Reference to the commonwealth's brief will appear (Cm. Br. pg. #).

SJC's opinion of Commonwealth v. Webster, 480 Mass. 161 (2018). (Cm. Br. 37).

The Webster opinion does not support the commonwealth's position. Rather, the dissimilarities between Webster and Robinson's case are material and favor reversal. In Webster, police responded to a home in Hyannis for report of shots fired. Webster, 480 Mass. at 162. Upon arrival, officers saw and eventually apprehended three (3) men seen fleeing from the house. Id. A fourth man, observed by witnesses, was not apprehended on scene. Id.

The decedent had been bound with handcuffs, zip ties, and duct tape; injured with blunt trauma and a stun gun; and shot in the torso. Id. A backpack was located in a parking lot next to the home. Id. at 163. The backpack contained many items associated with the decedent's death including two (2) firearms, a stun gun, duct tape, and zip ties. Id. A bullet retrieved from the decedent's body was consistent with one of the firearms. Id. Also, a black mask with the defendant's DNA was found in the backpack. Id.

Tire tracks on scene in the backyard were consistent with a vehicle a codefendant had rented. Id. at 164. The vehicle was found in Boston two (2)

days after the decedent's death. Id. It was located approximately one (1) mile from the defendant's residence and his DNA was found on the inside and outside of the rear passenger side door. Id.

Cellphone records showed the defendant was communicating with two (2) codefendants prior to the shooting, suggesting they were planning the crime including procuring a gun. Id. at 165. Cell site location information ("CSLI") placed a codefendant and the defendant's cellphone in the Barnstable area on the day of the decedent's death. Id. at 164. CSLI also showed their cellphones moving from Barnstable towards Boston approximately one (1) hour after the decedent's death. Id.

The SJC ruled the evidence was sufficient to prove the defendant was present at the scene and participated in the crime. Witnesses saw four (4) men fleeing the decedent's house, yet only three (3) were arrested. Id. at 166. The defendant's DNA was found on a mask discovered in the backpack that contained several items associated with the crime including a firearm, stun gun, duct tape and zip ties. Id. at 163. The Defendant's DNA was also recovered from a codefendant's rental car that was located one (1) mile

from the defendant's Boston residence and was capable of leaving tire marks consistent with those found on scene. Id. at 166. Cellphone records, including CSLI, demonstrated the defendant had planned the incident with his codefendants, was present in Barnstable on the day of the decedent's death, was present with his codefendants during the time the crime occurred, and was the fourth individual who fled to Boston in the codefendant's rental vehicle. Id.

In Robinson's case, unlike Webster, no witness saw Robinson, or an individual suspected to be Robinson, fleeing Figueroa's apartment following the shooting. Robinson was last seen with Figueroa at 9:00 p.m., one (1) hour and fifteen (15) minutes before shots were reportedly fired at 10:15 p.m. (Tr. 2-157, 225, 264)[4].

Furthermore, unlike in Webster, in which the defendant was linked to the tools used in the killing, the commonwealth introduced no evidence that Robinson was carrying a gun during the day Figueroa was shot. No gun was found in his Lexus or apartment. In addition, no DNA, blood, or trace evidence was found

[4] Reference to the trial transcript appears (Tr. Vol.#-pg. #).

among Robinson's clothes, boots, vehicle, or apartment connecting him to the shooting.

Regarding the cellphone records and CSLI in Robinson's case, the commonwealth presented no evidence that Robinson planned a crime in the days or weeks preceding Figueroa's death. The CSLI did not place Robinson in Dennis, or any other Cape Cod town, during the time corresponding with Figueroa's shooting.

In disingenuous disregard of sound precedent of Commonwealth v. Salemme, 395 Mass. 594 (1985) and Commonwealth v. Mazza, 399 Mass. 395 (1987)[5], the commonwealth posits that evidence of motive [Robinson was allegedly angry with Figueroa over drugs]; opportunity [the commonwealth argues Robinson was the last person to see Figueroa alive]; and consciousness of guilt [telling his girlfriend what time he arrived home and the comment made while at the house of correction] support Robinson's conviction, identifying him as the shooter as a matter of law beyond a reasonable doubt. (Cm. Br. 35-38). Quite to the

[5] The commonwealth neither cites nor refers to either case in its brief.

contrary, the commonwealth's evidence could not sustain a conviction.

While evidence of motive may make a defendant's participation in a crime more likely, it does not prove identity beyond a reasonable doubt. Commonwealth v. Gonzalez, 475 Mass. 396, 408 (2016). That a defendant arguably had a motive to commit a crime is not proof that he did in fact commit it. Commonwealth v. Swafford, 441 Mass. 329, 339 (2004). Even if motive is coupled with evidence of opportunity and consciousness of guilt, the evidence remains insufficient to establish the identity of the defendant as the culprit beyond a reasonable doubt. Gonzalez, 475 Mass. at 409; Mazza, 399 Mass. at 398; Salemme, 395 Mass. 554. Such evidence will not withstand a defendant's motion for a required finding of not guilty. Gonzalez, 475 Mass. at 409.

In Gonzalez, the defendant was convicted of first degree murder on the commonwealth's theory that she had driven four (4) codefendants to the scene of the decedent's shooting. Gonzalez, 475 Mass. at 396. The commonwealth argued her conviction was sound even though there was no direct evidence that she was the driver. Id. at 407. The commonwealth suggested the

defendant had motive because the decedent owed her money and had assaulted her boyfriend. Id.

The defendant also had opportunity. On the day the decedent was shot, the defendant was driving her mother's vehicle, which was similar to the suspect vehicle. Id. at 408. Cellphone records showed communication among and between the defendant's cellphone and some of the codefendants suggesting planning. Id. CSLI placed the defendant in the vicinity of the shooting. Id. The defendant exhibited consciousness of guilt. Id.

The SJC held the evidence was insufficient to sustain her conviction. Id. at 414. Evidence of her motive [anger at the decedent], ability to commit the crime [access to the vehicle and cellphone used in the shooting]; and consciousness of guilt [false statements to the police and effort to establish an alibi] did not identify her as the driver beyond a reasonable doubt. Id. It established she could have been the driver, and perhaps more likely than not that she was the driver, but it was not proof beyond a reasonable doubt. Id.

In Swafford, the SJC overturned a defendant's conviction because the evidence was insufficient to

identify him as the driver in a drive by shooting. Swafford, 441 Mass. at 332. The SJC reversed his conviction although the defendant had a clear motive [to seek retribution for a friends attack] and ability to participate in the crime [he was with the identified shooter in the hours preceding the shooting and his car was used in the crime]. Id. at 339-40. Taken as a whole, the commonwealth proved the defendant had motive and he could have been the driver, but motive and possibility did not establish guilt beyond a reasonable doubt. Id. at 343.

The SJC in Swafford noted, "the inferential leaps the commonwealth asks are too great." Id. In Robinson's case, in the absence of direct evidence of his guilt, the commonwealth is similarly asking this Court to take "great" inferential leaps to affirm his conviction based on evidence of motive and consciousness of guilt. The commonwealth's argument must be rejected. Robinson's first degree murder conviction must be reversed and a not guilty finding enter as a matter of law.

II. THE TRIAL JUDGE SHOULD HAVE CONDUCTED AN INDIVIDUAL *VOIR DIRE* OF THE REMAINING JURORS FOLLOWING HIS COLLOQUY WITH JUROR 2-7

It is a fundamental principle of constitutional law that a defendant is entitled to a fair trial before an impartial jury. Commonwealth v. Vann Long, 419 Mass. 798, 802 (1995). In accordance with the defendant's right, when there is evidence that the jury may have been exposed during the course of trial to material that is extraneous to the case, the Trial Judge should conduct a *voir dire* of the jurors to ascertain the extent of their exposure to the extraneous material and to assess its prejudicial effect. Commonwealth v. Francis, 432 Mass. 353, 369-70 (2000).

> [W]hen a claim of extraneous influence on a jury is raised, a trial judge must assess the possible prejudicial effect of the jury's exposure to extraneous information, and weigh the impact of that extraneous information on the jurors by conducting individual *voir dire* of each juror...the judge should also consider the efficacy of curative instructions. Commonwealth v. Kamara, 422 Mass. 614, 616 (1996)(internal case citations omitted).

The commonwealth argued in its brief that it was reasonable for the Trial Judge in Robinson's case not to have conducted a *voir dire* of the remaining jurors following juror 2-7's discharge on the third day of

trial, despite defense counsel's request and objection. (Cm. Br. 46). The commonwealth cited to Francis, 432 Mass. 353, and Commonwealth v. Tennison, 440 Mass. 553 (2003) to support its position. The commonwealth's reliance is misplaced.

In Francis, a juror advised the Court at the start of deliberations that she could not be impartial because there were gang members in the neighborhood where she lived that made her afraid and nervous to render a verdict. Francis, 432 Mass. at 367. The juror explained she told the other jurors that she was afraid, but did not tell them the fear arose from gang issues. Id. The court discharged the juror, substituted an alternate, and instructed the jury accordingly. Id. The Court declined, over the defendant's objection, to conduct a *voir dire* of each juror to determine if the excused juror had expressed her concerns about gangs to them. Id. at 370.

The SJC held there was no error. The juror told the Judge that she did not disclose her concern about gangs to the other jurors. Id. There was no basis to conclude she was deceptive with the Court. Therefore, there was no reason to infer that the jury

had been exposed to extraneous information that would have prejudiced the defendant. Id.

In Tennison, defense counsel moved to withdraw during jury deliberations because he learned that his client had been in contact with one (1) of the jurors. Tennison, 440 Mass. at 555. Citing attorney-client privilege, defense counsel did not disclose the juror's identity. Id. The Judge proceeded to conduct a *voir dire* of the jurors, asking each one whether he or she had been in contact with anyone involved in the case or knew if any other juror had been in contact with anyone involved in the case. Id. All jurors responded in the negative. Id. at 556. Defense counsel then identified the suspected juror. Id. The juror was discharged, an alternate was appointed, and the jury began deliberations anew. Id.

The defendant claimed on appeal that the Court should have conducted a second *voir dire* of the remaining jurors after the suspected juror was discharged. Id. The SJC disagreed. The Court had conducted an individual *voir dire* prior to discharging the juror. Id. at 558. The questions were neutral and did not imply the defendant was responsible for any alleged contact. Id. Every juror denied contact.

Id. After an alternate was selected, no party requested a second *voir dire* and there appeared no reason to question the jurors identically a second time. Id. at 559.

In Robinson's case, unlike the juror at issue in Francis, Juror 2-7 advised the Court that she did share extraneous information with her fellow jurors. Contrast with Francis, 432 Mass. at 370. Her bias as a "rank conservative" was "eating away at her." (Tr. 1-27; 3-320). Consequently, she could not say definitely whether she could consider the case fairly and impartially. (Tr. 3-327). She was definitive that she shared her thoughts with other jurors. (Tr. 3-327). Unlike the juror in Francis, there was reason to believe that Juror 2-7 was equivocal with the Court. She was asked three (3) times whether she could be fair and an impartial and could not once give a straight answer. (Tr. 3-323-25).

The Tennison opinion also is distinguishable from Robinson's case. In Tennison, the defendant did not request the *voir dire* that he raised as an issue on appeal. See Tennison, 440 Mass. at 559. Robinson did. In addition, the Court in Tennison conducted an individual *voir dire* to discern the nature and extent

of potential prejudice of extraneous influences. The Court in Robinson did not do so. Therefore, Mr. Robinson must receive a new trial.

CONCLUSION

For the forgoing reasons, as well as those advanced in his original blue brief, Robinson's conviction must be reversed and a finding of not guilty enter as a matter of law. Alternatively, Robinson must receive a new trial or have his verdict reduced pursuant to G.L. ch. 378, §33E.

By his Attorney,

/s/ Joseph F. Krowski, Esquire
JOSEPH F. KROWSKI, ESQUIRE
LAW OFFICE OF JOSEPH F. KROWSKI
30 Cottage Street
Brockton, MA 02301
(508) 587-3701
jfk@krowskilaw.com
BBO: 640902

Dated: March 26, 2019

MASS. R. APP. P. 16(k)
CERTIFICATE OF COMPLIANCE

I, Joseph F. Krowski, Esquire, hereby certify that the Reply Brief Defendant/Appellant Charles Robinson on Appeal from his Conviction Pursuant to Mass. Gen. L. ch. 278, §33E, complies with the rules of court that pertain to the filing of briefs, including, but not necessarily limited to: Rule 16(a)(13) (addendum); Rule 16(e)(references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21(redaction). Regarding Rule 20, this Reply Brief's nonexcluded page length is 14 pages. It was prepared on Microsoft Word 2013 using Courier 12-point monospaced font measuring not more than 10.5 characters per inch.

/s/ Joseph F. Krowski, Esquire
JOSEPH F. KROWSKI, ESQUIRE

Dated: March 26, 2019

CERTIFICATE OF SERVICE

I, Joseph F. Krowski, Esquire, hereby certify that I have this 26th day of March, 2019, served two (2) copies of the Reply Brief of the Defendant/ Appellant Charles Robinson on Appeal from his Conviction Pursuant to Mass. Gen. L. ch. 278, §33E, on Elizabeth Anne Sweeney, ADA, Barnstable County District Attorney's Office, 3231 Main Street, P.O. Box 455, Barnstable, MA 02630 by first class mail postage prepaid.

/s/ Joseph F. Krowski, Esquire
JOSEPH F. KROWSKI, ESQUIRE

Dated: March 26, 2019